No. 82-1171

In the Supreme Court of the United States

OCTOBER TERM, 1982

GARRISON M. EVERETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claim of "legal impossibility" constitutes a defense to a charge of conspiracy to obstruct the Internal Revenue Service in the collection of tax revenue, based on petitioner's role in devising a tax shelter scheme involving use of backdated documents for a fictitious taxpayer.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 692 F.2d 596.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1982. The petition for a writ of certiorari was filed on January 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner and a co-defendant, Richard I. Chira,[1] were convicted of conspiring to defraud the United States by impeding, impairing and obstructing the Internal Revenue Service in the collection of tax revenue, in violation of 18 U.S.C. 371. Petitioner was sentenced to three years in the custody of the Attorney General, with all but six months of the sentence suspended, placed on five years' probation, and fined $5,000. The court of appeals affirmed petitioner's conviction (Pet. App. 1-9).

The evidence showed (Pet. App. 1-3) that in March and April 1981 petitioner devised a scheme to shelter a substantial amount of the 1980 taxable income of a resident alien taxpayer by backdating documents to 1980. The shelter scheme combined a sale/lease-back of a Rolls Royce owned by Chira, petitioner's co-defendant, and a computer sale/lease-back transaction. The taxpayer was fictitious, an invention of an undercover IRS agent who had been referred to petitioner's firm after answering a newspaper advertisement offering tax shelter investments. The agent posed as a representative of the taxpayer and negotiated the shelter arrangement with petitioner and Chira. On April 16, 1981, in the agent's presence, petitioner and Chira signed the documents, which were backdated to December 22, 1980. At that time petitioner accepted $21,540 from the agent in connection with the transaction. Shortly thereafter, petitioner was arrested.

ARGUMENT

1. Petitioner contends (Pet. 4-5) that it was legally impossible for him to commit a substantive crime because the taxpayer involved in the shelter scheme he devised was

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[1]Chira also has filed a petition for a writ of certiorari. *Richard I. Chira* v. *United States*, No. 82-6040 (filed Jan. 14, 1983).

fictitious and could not file tax returns or pay taxes and that such legal impossibility constitutes a defense to the charge of conspiracy.

Petitioner's contention is without merit. Assuming, arguendo, that petitioner had demonstrated legal impossibility,[2] that would not constitute a defense to a charge of conspiracy, even in cases in which an agreement to commit a substantive offense is charged. Conspiracy presents a special danger to society, separate from that posed by the substantive offense that is the goal of the conspiracy. See, *e.g.*, *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961). Conspiracy is an offense that is separate and distinct from the underlying substantive crime; it is complete upon the agreement to commit the substantive crime and commission of an overt act in pursuit of it. See *United States* v. *Feola, supra*, 420 U.S. at 694; *United States* v. *Bayer*, 331 U.S. 532, 542 (1947). It is irrelevant that conspirators may be unable to achieve their criminal purpose, so long as they agree to commit the substantive crime. See *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915) ("[a] person may be guilty of conspiring although incapable of committing the objective offense"). These principles have led a number of courts of appeals to conclude correctly that impossibility does not constitute a defense to a charge of conspiracy. See, *e.g.*, *United States* v. *Waldron*, 590 F.2d 33, 34 (1st Cir.), cert. denied, 441 U.S. 934 (1979); *United States* v. *Giordano*, 693 F.2d 245, 249 (2d Cir. 1982); *United States* v. *Jannotti*, 673 F.2d 578, 591 (3d Cir.) (en banc), cert. denied, No. 81-1899 (June 7, 1982); *United States* v. *Rose*, 590 F.2d 232, 235-236 (7th Cir. 1978), cert. denied, 442 U.S. 929 (1979); *Beddow* v. *United States*, 70 F.2d 674, 676 (8th Cir.

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[2]In fact, it is unclear whether the alleged impossibility is more properly characterized as "legal" or "factual." See page 5 note 4, *infra*.

1934); *United States* v. *Thompson*, 493 F.2d 305, 310 (9th Cir.), cert. denied, 419 U.S. 834 (1974).[3] Cf. *Ventimiglia* v. *United States*, 242 F.2d 620 (4th Cir. 1957).

Petitioner's contention is particularly weak in the present case, in which he is charged not with conspiracy to commit a particular substantive crime, but with conspiracy to defraud the United States, a much broader objective. In such a case it is necessary only to prove an agreement to impair the lawful functions of the government and an overt act in pursuit of it. See *Dennis* v. *United States*, 384 U.S. 855, 861 (1966). It is clear that petitioner agreed to act in a manner that would impair the functions of the IRS and took steps toward that end. The existence of a real taxpayer who actually would file a tax return and/or pay taxes, thereby committing a substantive crime, is unnecessary to the conclusion that petitioner conspired to defraud the United States. See Pet. App. 4-5.

Petitioner argues (Pet. 4-5) that there is a conflict between the Fourth Circuit's decision in *Ventimiglia* v. *United States, supra*, and the decisions of the First, Second, Seventh and Ninth Circuits cited above on the question whether legal impossibility constitutes a defense to a charge of conspiracy. It is questionable whether the conflict that petitioner describes in fact exists. The holding in *Ventimiglia* did not concern impossibility, but rather whether there was sufficient evidence to support a finding of a conspiracy to violate a provision of the Taft-Hartley Act that prohibited payment of money by an employer to any representative of its employees. The defendants had agreed to make payments to an individual who was not, and who they

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[3]See also W. LaFave & A. Scott, *Criminal Law* § 62, at 474-476 (1972) (courts in conspiracy cases usually have held that impossibility of any kind is not a defense); Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 944-945 (1959).

knew was not, an employee representative. The court concluded, therefore, that the government had failed to prove its charge of a conspiracy to violate the Act. 242 F.2d at 622-625. The court went on to state that if the defendants had believed that payments would be made to an employee representative, legal impossibility could be a defense to a charge of conspiracy. *Id.* at 625-626. However, the statements concerning impossibility constitute dictum, not a holding. Moreover, it is unclear whether *Ventimiglia*, which was decided in 1957, and which is rarely cited by federal courts for its discussion of impossibility, remains good law today.[4] Cf. *Osborn* v. *United States*, 385 U.S. 323, 333 (1966).

2. Petitioner further contends (Pet. 5-6) that this Court should resolve a conflict among the circuits relating to "standards for establishing legal impossibility." As suggested in the preceding section, impossibility is not a defense to a charge of conspiracy, so there is no need to reach the question of a proper definition of impossibility. Moreover, the cases petitioner cites for the proposition that

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[4]Even if *Ventimiglia* could be read to conflict with the decisions of other courts of appeals, that conflict does not affect this case. *Ventimiglia* and the decisions of other circuits cited by petitioner address impossibility as a defense to charges of conspiracy to commit specific substantive crimes. The present case involves a conspiracy to defraud the United States, a much broader objective that does not necessarily entail the commission of a particular substantive crime. See page 4, *supra*. Moreover, the present case may well involve factual impossibility, as opposed to legal impossibility. The court in *Ventimiglia* acknowledged that factual impossibility would not be a defense to a charge of conspiracy and that the line between the two varieties of impossibility is not always easy to draw. 242 F.2d at 625-626. See also *United States* v. *Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D. N.Y.), aff'd, 484 F.2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 978 (1974) ("factual impossibility" denotes conduct where the objective is proscribed by the criminal law, but a circumstance unknown to the actor prevents him from bringing it about).

a conflict exists have little relevance to the present case. Three of the cases cited—*United States* v. *Marin*, 513 F.2d 974 (2d Cir. 1974); *United States* v. *Berrigan*, 482 F.2d 171 (3d Cir. 1973); and *United States* v. *Oviedo*, 525 F.2d 881 (5th Cir. 1976)—involve attempt charges. Thus, they cannot be regarded as precedents for conspiracy cases. See, *e.g.*, *United States* v. *Giordano*, *supra*, and *United States* v. *Jannotti*, *supra*. As noted in the preceding section, the Fourth Circuit's discussion of impossibility in *Ventimiglia* is dictum, since the defendants in that case in fact were aware of the objective circumstances. In addition, the views of the Fifth Circuit in *Oviedo* and the Ninth Circuit in the decision below that there should be "significant objective acts to corroborate unequivocally the criminal intent in a conspiracy" (Pet. App. 6) do not represent a standard for defining impossibility, but were set forth as a safeguard against "possible erroneous official conclusions" about a defendant's state of mind (*ibid.*, quoting *United States* v. *Brooklier*, 459 F. Supp. 476 (C.D. Cal. 1978)).

Petitioner argues finally (Pet. 5) that *United States* v. *Berrigan*, *supra*, stands for the proposition that "there can be no conviction for conspiracy to defraud the government when the government has participated in and has knowledge of the scheme." *Berrigan* does not stand for that proposition. In *Berrigan* the charge was an attempt to commit the substantive crime defined under 18 U.S.C. 1791 as smuggling letters into a federal prison without the knowledge and consent of the warden. In fact, the warden did have knowledge of the letters at issue, and the court concluded that the government therefore had failed to prove a statutory element of the completed crime. *United States* v. *Berrigan*, *supra*, 482 F.2d at 185-190. That holding is irrelevant to the present case, in which ignorance of government officials is not an element of the offense. *Berrigan* has,

moreover, been limited by the Third Circuit to the particular statute at issue in that case. *United States* v. *Everett*, No. 81-2644 (Feb. 15, 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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